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No. 97-1121

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CITY OF CHICAGO,

Petitioner.

v.

JESUS MORALES, et al.,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an ordinance which criminalizes "remaining in one place with no apparent purpose" in association with a person believed by a police officer to be a gangmember is void for vagueness by failing to place a reasonable person on notice of what conduct to avoid and/or by encouraging arbitrary and discriminatory enforcement?

2. Whether an ordinance which arbitrarily and unreasonably criminalizes "remaining in one place with no apparent purpose" in association with a person believed by a police officer to be a gangmember violates substantive due process guarantees?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.	2
REASONS FOR DENYING THE PETITION	8
CONCLUSION.	18

TABLE OF AUTHORITIES

Ill. Const. art I, section 2 9

California v. Freeman, 488 U.S. 1311,
109 S.Ct. 854, 102 L.Ed.2d 957 (1989). 9

City of Dallas v. Stanglin, 490 U.S. 19,
109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). 12

Dawson v. Delaware 503 U.S. 159, 112 S.Ct. 1093,
117 L.Ed.2d 309 (1992). 14, 15

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068,
25 L.Ed.2d 368 (1970) 14

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979) 14

Papachristou v. City of Jacksonville, 405 U.S. 156,
92 S.Ct. 839, 31 L.Ed.2d 110 (1972) 11

People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090,
929 P.2d 596, 60 Cal. Rptr. 2d 277, cert. denied
117 S.Ct. 2513 (1997) 11, 12

People v. Nash, 173 Ill.2d 423,
672 N.E.2d 1166 (1996) 9

Rollins v. Ellwood, 141 Ill.2d 244,
565 N.E.2d 1302 (1990) 9

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889,
20 L.Ed.2d 917 (1968) 15

Terry v. Ohio, 392 U.S. 1,
88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). 14

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Respondents, Jesus Morales et al., respectfully request that this Court deny the City of Chicago's Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois in these cases.

JURISDICTION

This Court does not have jurisdiction over the questions presented in the City's Petition with respect to the respondents, together or individually, because the decision of the Illinois Supreme Court rested on adequate and independent state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions listed in the City's Petition, these cases involve Article I, section 2 of the Illinois Constitution.

STATEMENT OF THE CASE

The City's Petition describes the enactment of its gang loitering ordinance but omits any discussion of the records of the individuals who were convicted and sentenced for violation of that ordinance.

Jesus Morales

At a bench trial, Officer Ray Frano testified that he saw approximately six young male Hispanics standing at the street corner by 1100 West Belmont "(t)alking to citizens on the street." (Morales, R. 6). That Chicago neighborhood was predominately Caucasian. (Morales, R. 12-13). Officer Frano approached the Hispanic teenagers on the corner with the stated reason: "(b)ecause we wanted to know if they lived in the neighborhood or from the neighborhood." (Morales, R. 7). He told the group of Hispanic teenagers that he would arrest them if they did not leave. (Morales, R. 8, 10-11). Officer Frano left the scene. (Morales, R. 11). When he returned later, he arrested Jesus Morales and another person at the corner for gang loitering. (Morales, R. 11). According to Officer Frano, he believed Morales was a gang member because Morales wore blue and black clothing. (Morales, R. 9-10, 12).

Jesus Morales testified that he was pausing at the intersection while walking on crutches home from a nearby hospital. (Morales, R. 17-18, 19-21). After Morales told Officer Frano that he had no outstanding warrants, Officer Frano arrested him for gang loitering. (Morales, R. 18-19). Morales himself was not a gangmember although he knew that the other person present on the corner was a Gangster Disciple. (Morales, R. 19).

The trial court found Morales guilty of gang loitering and sentenced him to 1 day in the Cook County Jail. (Morales, R. 23, 24).

Gregorio Gutierrez

Officer Matthew Craig testified at a bench trial that he observed Gregorio Gutierrez standing at the corner of Broadway and Winona Streets in Chicago with two other men "doing absolutely nothing." (Gutierrez, R. 8-9, 12). Officer Craig and his partner immediately told them to break up and leave the area. (Gutierrez, R. 12, 18-19). Officer Craig and his partner drove off around the block. (Gutierrez, R. 12, 19). When they returned, they saw Gutierrez standing at the same corner and arrested him for gang loitering. (Gutierrez, R. 12, 13, 18). According to Officer Craig, Gutierrez had told him on previous occasions that he belonged to the Latin Kings. (Gutierrez, R. 11-12).

Gregorio Gutierrez testified that he had left his home with his brother and was walking towards a nearby El stop to go to

their mother's place of employment. (Gutierrez, R. 24-25, 28). Along the way, they stopped to purchase a sandwich and soda from a store. (Gutierrez, R. 24-25, 28). Officer Craig and his partner drove up to them at the corner and arrested them without ever telling them to leave. (Gutierrez, R. 26-27, 29). When Gutierrez asked why he was being arrested, "they told us they don't like us." (Gutierrez, R. 27, 29).

Gutierrez never told Officer Craig that he was a member of the Latin Kings. (Gutierrez, R. 29). Gutierrez was no longer a member of the Latin Kings and had not been a member on June 3, 1993. (Gutierrez, R. 30). No one else with him at the corner was a member of the Latin Kings. (Gutierrez, R. 30).

The trial court found Gutierrez guilty and sentenced him to 27 days in the Cook County Jail. (Gutierrez, R. 32, 37).

Daniel Washington

At a bench trial, Officer Estrella testified that on March 13, 1994, at 7:45 p.m. at 2942 West Fulton in Chicago about 150 feet from a store, he drove up to "several youths out there yelling and screaming at passing cars and stuff like that. Just being loud on the street." (Washington, R. 9-10, 17, 19). Officer Estrella observed the youths for a minute or two before approaching them. (Washington, R. 18). Daniel Washington was in the group of youths. (Washington, R. 10). A couple of the youths admitted that they were Vice Lords but Officer Estrella could not recall which ones. (Washington, R. 11, 16-17). Officer Estrella told them to disperse for the stated reason

that "they were running too deep, meaning too many of them out there." (Washington, R. 11).

Officer Estrella took off for an hour or hour and a half. (Washington, R. 11, 18). When he returned, he saw the same youths at the corner, went immediately up to them and told them to disperse. (Washington, R. 11, 18). Officer Estrella left for another unspecified length of time and arrested Washington and the other youths when he returned, telling them "they didn't want to listen so we're taking them in for gang loitering." (Washington, R. 12, 18-19). According to Officer Estrella, Washington admitted subsequent to his arrest that he belonged to the Vice Lords. (Washington, R. 16).

Barbara Ann Williams Washington, Daniel's mother, testified that her son was not a member of any gang. (Washington, R. 27).

Daniel Washington testified that he went to the unfamiliar neighborhood of Sacramento and Fullerton with a friend. (Washington, R. 28, 31). While his friend stopped to talk to some people Daniel did not know, Daniel went into a nearby store. (Washington, R. 29, 31-32). When he came out 15 or 20 minutes later, he was arrested. (Washington, R. 29-30, 32). No one asked, and Daniel did not tell anyone that he was in the Vice Lords. (Washington, R. 31).

The trial court found Daniel Washington guilty and sentenced him to 20 days in the Cook County Jail. (Washington, R. 35-36).

Jose Renteria

At a bench trial, Officer Pena testified that Jose Renteria's name appeared on a gang card file on the Satan Disciples maintained by the Chicago Police Department. (Renteria, R. A13). The card was not produced at trial. (Renteria, R. A14). Officer Pena identified members of the Satan Disciples by the area they hung out, by the hand signals they flashed and by the colors they wore although she stated that "they don't always wear them." (Renteria, R. A26-29).

On July 9, 1994 at 11:30 p.m., Officer Pena went in plainclothes to 1600 West Ohio in Chicago. (Renteria, R. A14-A15). She saw Jose Renteria with two members of the Satan Disciples "hanging out" on the corner. (Renteria, R. A16-A17). Officer Pena had ordered them to leave 15 or 20 minutes before. (Renteria, R. A18, A22-A23, A24-A25). According to Officer Pena, she considered her order to leave to apply to anywhere in the general vicinity of the corner although she had only specifically told them to leave the corner itself. (Renteria, R. A22-A23, A25). When ordered to leave, they had walked away. (Renteria, R. A22). She arrested Jose Renteria but no one else for gang loitering without again warning him to leave. (Renteria, R. A18, A20, A23).

The trial court found Renteria guilty and sentenced him to one day in the Cook County Jail. (Renteria, R. A35-A38).

Sandy Garvin

The parties stipulated at a bench trial to the following testimony of Officer Fran:

> On February 12, 1993, at approximately 8:50 in the evening, he encountered the defendant Sandy Garvin along with another individual Jerry Davi loitering in the vicinity of 2750 North Hoyne for no apparent purpose.
>
> The officer approached the individual based on his reasonable belief that the Defendant along with Mr. Jerry Davi were members of a Latin Kings criminal street gang. His belief was based on self-admission by the parties and by tattoos that were on each of their bodies.
>
> Based on this reasonable belief, Officer Fran ordered Mr. Garvin and Mr. Davi to disburse (sic). Mr. Garvin failed to disburse (sic) upon the officer's order.

(Garvin, R. 9). Based on this stipulation, the court found Garvin guilty of gang loitering and sentenced him to 2 days in the Cook County Department of Corrections. (Garvin, R. 10).

Raul Jimenz, Jr.

The Complaint alleged that on February 15, 1993 at 1324 W. 18th Place, Chicago, Illinois, Raul Jimenz, Jr. "knowingly remained at a known designated location for criminal street activity, after being informed by a police officer to disperse from this area. Further, the above, is a known member of a criminal street gang, to wit: 'Ambrose.'" (Jimenz, CLR. 2).

At a bench trial, the parties stipulated to the facts in the complaint. (Jimenz, R. 3-4). The court found Jimenz guilty of gang loitering and sentenced him to six months of supervision and 7 days of community service. (Jimenz, R. 4-5).

REASONS FOR DENYING THE PETITION

This Court should not entertain the City of Chicago's Petition for a Writ of Certiorari. Reversal would not change the outcome for the litigants here. The Illinois Supreme Court's opinion was based on the separate and independent ground of the Illinois Constitution, state caselaw and a determination that the evidence presented at the trials of respondents who were convicted did not prove that the police officers adhered to the ordinance and its accompanying general order. In addition, the Illinois Appellate Court found the City's gang loitering ordinance to be unconstitutional on at least three other grounds not reached by the Illinois Supreme Court.

Nor is review warranted by the importance of the questions presented. The decision of the Illinois Supreme Court holding the City's gang loitering ordinance to be vague and in violation of substantive due process was focused on the specific language before it. As such, that decision neither stands in conflict with other jurisdictions nor has an impact beyond the litigants in the Illinois courts. In any event, the Illinois Supreme Court correctly determined that an ordinance which criminalized "remaining in one place with no apparent purpose" in association with a person whom a police officer believed to be a gang member was void for vagueness and violated rights of substantive due process.

1. This Court should not grant review because the decision of the Illinois Supreme Court rested on adequate and independent state grounds. The opinion cites the Illinois Constitution in support of the finding that the Ordinance violates due process. Petition Appendix at p. 6a, citing Ill. Const. art I, section 2. The Illinois Constitution has been interpreted to stand separate and independent from the federal guarantee of due process. See e.g. Rollins v. Elwood, 141 Ill.2d 244, 275, 565 N.E.2d 1302 (1990). The Illinois Supreme Court also placed heavy reliance on People v. Nash, 173 Ill.2d 423, 431, 672 N.E.2d 1166 (1996), which expressly invoked only state law in support of its holdings. Petition Appendix at pp. 11a-12a.

Moreover, the Illinois Supreme Court found that "a thorough examination of the record reveals that police officers have not followed the guidelines of the general order in a uniform manner." Petition Appendix at p. 16a, n. 1 (specifically discussing the evidence presented at the trial of respondent Jesus Morales). See e.g. California v. Freeman, 488 U.S. 1311, 109 S.Ct. 854, 102 L.Ed.2d 957 (1989) (decision that defendant's conduct was not within statutory definition of crime furnished adequate and independent state ground for reversing conviction). As in Freeman, were this Court to review these cases and hold that the Illinois Supreme Court misinterpreted federal law, on remand the Illinois Supreme Court would nevertheless reach the same result based on the state law

grounds that the City failed to prove that the police followed the ordinance and its accompanying general order.

Review of the questions presented in the City's Petition would also be a futile gesture here because the Illinois Appellate Court found the City's ordinance to be unconstitutional on at least three additional grounds not reached by the Illinois Supreme Court. Petition Appendix at p. 21a. Clearing only the two hurdles of vague language and substantive due process cannot remove those other obstacles to reinstating this flawed ordinance.

2. In any event, contrary to the City's assertions in its Petition, there is no relevant conflict here because the instant ordinance is not similar to the laws addressed by the City.

The Illinois Supreme Court properly ruled that an ordinance which criminalized "remaining in one place with no apparent purpose" was void for vagueness. The City's Petition points to other cases purportedly in conflict with this decision. Petition at p. 14. However, none of the cited regulations penalized loitering "with no apparent purpose." Instead, as the Illinois Supreme Court recognized, ordinances which have been upheld by other courts have all included a requirement of some overt act or criminal intent. Petition Appendix at pp. 10a-11a. Those containing language similar to the City's ordinance have been struck down. Petition Appendix at pp. 10a-11a.

Similarly, the City's contention that lower courts are in irreconcilable disagreement about the scope of the vagueness doctrine in general and Papachristou in particular ignores the nature of a void-for-vagueness challenge. Petition at pp. 14-18, citing Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). In determining whether a statute is vague, a court must analyze the precise words of that particular statute. See e.g. Petition Appendix at pp. 6a-7a. It is hardly remarkable that courts have come to different conclusions about various loitering laws when such laws are rarely drafted with uniform language.

In addition to the purported split of authority over loitering laws, the City alleges the existence of other unrelated conflicts over such laws as the Model Penal Code, cruising ordinances, and prohibitions against sleeping in public. Petition at pp. 16-17. However, the City does not explain how resolution of any of those purported conflicts would lead to a reversal of the Illinois Supreme Court's decision about the instant ordinance. Similarly, while the City complains about the uncertain scope of Papachristou with respect to other regulations, it does not advance any argument that the Illinois Supreme Court misapplied Papachristou's holding to the ordinance at issue here.

Finally, the City claims that the decision of the Illinois Supreme Court about substantive due process is in conflict with the decision of the California Supreme Court in People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d

277, cert. denied 117 S.Ct. 2513 (1997). Acuna is clearly distinguishable because it involved not a criminal law but an injunction entered against a small group of specified individuals. Here, in contrast, the City enacted a general criminal law which it enforced against 45,000 people. Petition at p. 9. The Illinois Supreme Court further distinguished Acuna on the basis that the language of the injunction there required actual knowledge of gangmembership instead of the "reasonable belief of a police officer" language in the City's ordinance. Petition Appendix at p. 12a. Likewise, there is no conflict with City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), which upheld a dancehall regulation under the exercise of parens patriae powers. Petition at p. 19.

Accordingly, there is no meaningful conflict here which would warrant this Court's review.

3. Nor is there any basis for the City's contention that "under the approach taken in the decision below, it is decidedly unlikely that any loitering ordinance could survive constitutional attack." Petition at p. 10.

The Illinois Supreme Court's decision about the precise language of this particular ordinance does not doom all regulation of loitering. The opinion itself points out that "when the term 'loitering' is joined with a second specific element to form the prohibited conduct defined by a criminal loitering statute, courts have uniformly found that the law sufficiently informs persons as to the forbidden conduct, and

thus, is not vague." Petition Appendix at p. 11a. The Illinois Supreme Court noted that statutes combining loitering with another overt act or criminal intent furnished examples of sufficiently specific second elements. Petition Appendix at p. 10a.

Consequently, if the City wishes to reap the supposed benefits of the "Broken Windows" theory of law enforcement or to avoid potential civil liability under Section 1983, it may simply amend its loitering ordinance to any one of the myriad formulations which have been upheld in other jurisdictions.

4. The decision of the Illinois Supreme Court was correct on the merits and in no way amounts to "serious misapplication of vagueness doctrine." Petition at p. 10.

The City argues that an order from a police officer tells suspects "precisely what they must do - move along - to avoid arrest." Petition at p. 12. But the ordinance here provides no guidance for avoiding a police order to disperse in the first place. Instead, as the Illinois Supreme Court held, the decision whether certain persons are loitering in the presence of a gangmember is left to the standardless discretion of a police officer. Petition Appendix at pp. 13a-15a. The City's Petition focuses on the notice prong of the vagueness doctrine and fails to acknowledge that the Illinois Supreme Court also found that the Ordinance as written - and as applied to respondents who were convicted - encouraged arbitrary and discriminatory enforcement. Petition Appendix at pp. 14a-17a.

The City's Petition exhibits a fundamental misunderstanding of criminal law when it argues that an officer's reasonable belief that a loiterer is a gangmember saves its ordinance from vagueness because "all criminal statutes are enforced based on the arresting officer's belief that reasonable suspicion or probable cause exists." Petition at p. 13. However, other criminal statutes including loitering laws do not elevate an officer's reasonable suspicion or probable cause into an element of the offense as the City's ordinance purports to do. The Ordinance here allows for a person to be convicted - not merely stopped or arrested - based solely on a reasonable belief rather than proof beyond a reasonable doubt that the loitering is done in association with a gangmember. See e.g. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (essential elements of criminal offense must be proven beyond a reasonable doubt); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Moreover, the City misapplies the notion of probable cause by divorcing it from the requirement of criminal activity. It is black letter law that reasonable suspicion for a Terry stop or probable cause for arrest must stem from particularized and objective facts indicating that a suspect has committed or is about to commit a crime. See e.g. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Here, the Ordinance requires only that a police officer have a reasonable belief about a person's association with a gang, which cannot by itself constitute criminal activity. See e.g. Dawson v. Delaware, 503

U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). "Probable cause" with respect to identity or association is not constitutionally sufficient probable cause that a person is involved in criminal activity. See e.g. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968).

With respect to substantive due process, the City's Petition devotes considerable space to arguing points not reached below. Petition at pp. 18-20. In its opinion, the Illinois Supreme Court expressly stated that its ruling on substantive due process did not reach questions of the right of expressive or intimate association. Petition Appendix at p. 19a. Instead, the Illinois Supreme Court found the City's ordinance to be unconstitutional under lesser scrutiny because it arbitrarily intruded on personal liberties including the general rights to travel and to associate with others. Petition Appendix at 18a.

Without citation of any authority, the City hypothesizes that "loitering is the antithesis of travel" and that its ordinance does not unreasonably burden that right so long as citizens "keep on walking." Petition at p. 20. One does not have to look further than the facts in the record about the City's enforcement of this provision for a demonstration of the ordinance's inherent arbitrariness and unreasonableness. Respondent Jesus Morales was convicted of gang loitering after he paused while walking home from the hospital on crutches. (Morales, R. 17-18, 19-21). Notably, despite its protestations about the right of association, the City also prosecuted and

convicted Respondent Gregorio Gutierrez for his loitering in association with his own brother. (Gutierrez, R. 24-25, 28); Petition at pp. 18-19.

Pointing to the history and tradition of loitering laws, the City argues that there is no constitutional basis for invalidating prophylactic laws enacted after legislative cost/benefit balancing. Petition at p. 20-21. The City also expresses its desire to dispense with the requirement of proof of criminal activity beyond a reasonable doubt. Petition at p. 24. However, as numerous courts have recognized, loitering laws have an equally long history of abuse. Petition Appendix at pp. 8a. Labelling a criminal statute as a "prophylaxis" cannot evade the attendant constitutional requirements including proof beyond a reasonable doubt and language that clear enough to define prohibited conduct and confine the exercise of discretion. Petition at pp. 20-21.

Because the decision of the Illinois Supreme Court addressing the particular structure and language of this ordinance was correct in finding it to be wanting on grounds of void-for-vagueness and arbitrariness, no further review is necessary.

In short, the City's Petition has advanced no grounds to warrant review. The Illinois Supreme Court's decision rested on adequate and independent state grounds and the Illinois Appellate Court found the Ordinance to be unconstitutional for at least three additional flaws. There is no conflict in the

lower courts relevant to the particular language of this ordinance. The demise of this ill-drafted ordinance will have no impact beyond the litigants as the means of appropriate regulation of loitering is well-established in other case law. Finally, the decision itself is correct on the merits.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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